



Memorandum

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TO: House Committee on Energy and Commerce
Attention: Richard Frandsen

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SUBJECT: Questions Related to United States-Canada Waste Trade Agreement

This memorandum responds to your questions regarding the United States-Canada Waste Trade Agreement and its implementation. Your question regarding the amounts of municipal solid waste being sent to Michigan from Canada is being answered in a separate memorandum.

1. When was the bilateral treaty first entered into and then amended to cover municipal solid waste?

The Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste, providing for trade in hazardous waste between the two Parties subject to notice and consent requirements, was signed at Ottawa, October 28, 1986, and entered into force November 8, 1986.¹ The Agreement was amended in 1992 to apply also to trade in "other waste." The

¹ Treaties and Other International Acts (TIAS) 11099. See Dep't of State, *A List of Treaties and Other International Agreements of the United States in Force on January 1, 2000*, at 46 [hereinafter cited as *Treaties in Force*]. The Agreement is in force for 5 year periods (beginning November 8, 1986), and is automatically renewable at the end of each such period unless either Party gives written notice of termination to the other Party at least 3 months prior to the expiration of the five-year period (Art. 13). During any such 5-year period, the Agreement may be terminated upon one year written notice given by one Party to the other (Art. 13).

According to the Executive Branch, the Agreement was entered into at the time to establish alternative procedures for the export of hazardous waste (namely provision for implied consent) for purposes of requirements and deadlines contained in § 3017 of the Resource Conservation and

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amendment was effected through an exchange of letters between the Parties dated November 4 and November 25, 1992, and entered into force on the latter date.² "Other waste" is defined, at Article 1(h) of the Agreement, as "municipal solid waste that is sent for final disposal or for incineration with energy recovery, and residues arising from the incineration of such waste, as defined by the Parties' respective national legislations and implementing regulations, but excluding waste covered under paragraph (b) of this Article."³

2. What does it provide with respect to notification of shipments from Canada? Is the notification from government to government?

Article 3 sets forth the Agreement's notice and consent requirements. Article 3(a) requires the designated authority of the country of export to notify the designated authority of the country of import of proposed transboundary shipments of hazardous waste or other waste. The "designated authorities" are listed in Article 1(a) of the Agreement: for Canada, the designated authority is the Canadian Department of the Environment; for the United States, the U.S. Environmental Protection Agency (EPA). Thus, the Agreement requires government-to-government notification and where exports from Canada to the United States are involved, the Canadian Department of the Environment would need to notify the U.S. EPA.

Article 3(b) provides that notice may cover an individual shipment or a series of shipments extending over a 12-month period or less and requires that the notice contain the following information:

- (i) the exporter's name, address and telephone number, and if required in the country of export, the identification number;
- (ii) for each hazardous waste and other waste type and for each consignee:
 - a description of the waste to be exported, as identified by the waste identification number, the classification and the shipping name as required on the manifest in the country of export;

¹ (...continued)

Recovery Act (RCRA), 42 U.S.C. § 6938. Dep't of State, Office of the Legal Adviser, *Cumulative Digest of United States Practice in International Law 1981-1988*, Book III, at 3088-89 (released 1995)[hereinafter cited as *State Department Digest*].

² See *Treaties in Force*, *supra* note 1, and *The Marine Mammal Commission Compendium of Selected Treaties, International Agreements, and Other Relevant Documents on Marine Resources, Wildlife, and the Environment*, v.3, at 2957 (1993?)[hereinafter cited as *MMC Compendium*]. The letter of Richard J. Smith, for the Acting U.S. Secretary of State, to Derek H. Burney, Ambassador of Canada, is dated November 4, 1992; the letter of Derek H. Burney, Ambassador of Canada, to Lawrence Eagleburger, Acting U.S. Secretary of State, is dated November 25, 1992. *MMC Compendium*, *supra* at 2957-58.

³ Article 1(b) of the Agreement defines "hazardous waste" as "with respect to Canada, dangerous goods, and with respect to the United States, hazardous waste subject to a manifest requirement in the United States, as defined by their respective national legislations and implementing regulations."

- the estimated frequency or rate at which such waste is to be exported and the period of time over which such waste is to be exported;
- the estimated total quantity of the waste in units as specified by the manifest required in the country of export;
- the point of entry into the country of import;
- the name and address of the transporter(s) and the means of transportation, such as the mode of transportation (air, highway, rail, water, etc.) and type(s) of container (drums, boxes, tanks, etc.);
- a description of the manner in which the waste will be treated, stored or disposed of in the importing country;
- the name and site address of the consignee;
- an approximate date of the first shipment to each consignee, if available.⁴

The EPA has 30 days from the date it receives the notice to respond, "indicating its consent (conditional or not) or its objection to the shipment" (Art. 3(c)). If no response is received within the 30 day period, the country of import will be considered to have no objection to the export and "the export may take place conditional upon the persons importing the hazardous waste or other waste complying with all the applicable laws of the country of import" (Art. 3(d)). The importing country may amend the terms of a proposed shipment or shipment (Art. 3(e)) and its consent "whether express, tacit, or conditional ... may be withdrawn or modified for good cause" (Art. 3(f)). Where "other waste" is involved, however, manifest-related requirements in Article 3 "may ... be substituted by alternative tracking requirements" (Article 3(g)).

3. Has Canada been notifying the United States of shipments of municipal solid waste in accordance with the terms of the bilateral agreement?

According to the EPA, the two governments have not implemented the notice and consent provisions of the bilateral agreement for purposes of municipal solid waste (MSW) shipments.⁵ Consequently, EPA has not received any notices for such shipments.⁶

⁴ Article 8 of the Agreement provides for the protection of information required under Article 3 that is covered by an agreement or agreements of confidentiality between a Party and an exporter.

⁵ For hazardous waste exports, each country has notification requirements in place. For the United States, RCRA § 3017 (42 U.S.C. § 6938) establishes prior notice and consent requirements for the export of hazardous wastes, but the statute does not address the import of wastes. Canada also has notification requirements in place for hazardous waste exports, and notifies EPA of proposed hazardous waste shipments pursuant to the terms of the bilateral agreement. According to EPA, the Canadian Government has enacted legislation, and regulations are now being developed to

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4. **Has the United States protested in any way the failure of Canada to notify the United States? If so, please describe when, how and the results.**

According to the EPA, no.

5. **Has the United States objected to any shipments of municipal solid waste since 1992?**

According to the EPA, no.

6. **Does the bilateral agreement expressly provide that the countries "will make best efforts to provide notification" where current regulatory authority is insufficient?**

Article 5.3 of the Agreement expressly provides that "[t]o the extent any implementing regulations are necessary to comply with this Agreement, the Parties will act expeditiously to issue such regulations consistent with domestic law." Article 5.3 further and expressly provides that "[p]ending such issuance, the Parties will make best efforts to provide notifications in accordance with this Agreement where current regulatory authority is insufficient." As with Article 3, where "other waste" is involved, manifest-related requirements in Article 5 may also "be substituted by alternative tracking requirements" (Article 3(g)).

7. **Is there any evidence that this has happened?**

No.

⁵ (...continued)

implement the notification provisions of the bilateral agreement for purposes of shipments of "other wastes" to the United States.

⁶ An infrequent exception to this statement occurs when differences exist between each country's definition of hazardous waste. If a particular waste is considered to be non-hazardous under U.S. law and hazardous under Canadian law, then the U.S. exporter is required to notify the Canadian Government directly. (EPA does not receive information about these shipments, as EPA has no authority to request notification of nonhazardous waste shipments from exporters.) If a waste is considered to be non-hazardous under Canadian law and hazardous under U.S. law, no notice is given to the United States Government because RCRA does not require notification for waste imports. However hazardous waste importers generally must comply with RCRA hazardous waste manifest requirements (40 CFR 262.60), and customs officials at the border sometimes collect and send a copy of the manifests to EPA. Additionally, RCRA regulations include a one-time requirement that a hazardous waste treatment, storage, or disposal facility (TSDF) must notify EPA of their involvement in receiving foreign waste.